

Has the European Court of Human Rights Turned a Blind Eye to Alleged Rights Abuses in Turkey?

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On 8 December 2016, in the case of *Zihni v. Turkey*, (App. No. 59061/16) the European Court of Human Rights (hereinafter “the Court”) rejected a second application arising out of alleged violations in Turkey in the aftermath of the attempted coup on 15 July 2016.

The Court’s dismissal of the complaint for failure to exhaust available domestic remedies (Article 35 of the European Convention on Human Rights – hereinafter “the Convention”) is consistent with its 17 November 2016 decision in the case of *Mercan v. Turkey* (App. No. 56511/16), so it came as no surprise. In the *Mercan* case, the Court similarly dismissed the application, which concerned the unlawfulness, length and conditions of a judge’s pre-trial detention in the absence of any evidence.

In *Zihni v. Turkey*, the applicant was suspended from his duties as a school’s deputy headmaster on 25 July 2016 and subsequently dismissed from public service, together with 50,874 other civil servants, by the list appended to the Decree no. 672 on 1 September 2016, on account of his alleged “membership of, affiliation, link or connection” to terrorist organizations.

The application before the Court in *Zihni* cited numerous rights violations: (1) lack of access to a court (Article 6, Article 13 and Article 15); (2) no punishment without law (Article 7); (3) violation of the right to respect for his family life (Article 8); and (4) discrimination on account of his dismissal (Article 14).

While the basis of the Court’s dismissal in each case articulates a settled rule for admissibility to the Court’s jurisdiction, both decisions ring hollow in the context of the so-called availability of domestic remedies in present-day Turkey. No doubt that the state of emergency casts these cases in a somewhat different light, but even under such circumstances the fundamental rights at issue in these cases are not novel to the Court. What the Court may have failed to appreciate is that these dismissals may effectively deprive the applicants of any meaningful justice whatsoever, by requiring that they first try to navigate the legal chaos in Turkey.

In *Zihni v. Turkey*, the applicant lodged his application without having first brought proceedings before the national courts including an individual application before the Turkish Constitutional Court (hereinafter “the TCC”). To explain his failure to do so, the applicant asserted that no effective remedies capable of allowing him to challenge his dismissal before the national courts were available since the measures taken by decree-law within the framework of the state of emergency would not be subject to appeal. He also claimed that the TCC was not in a position to reach an effective decision impartially, referring to a decision by the TCC on 9 August in which it decided to dismiss two of its members. Nevertheless, in the *Zihni* case, the Court ruled that (para.30) there were *no special circumstances* absolving the applicant from the obligation to exercise the domestic

remedies available to him under Turkish law, namely an administrative action and an individual appeal to the Constitutional Court.

Yet, in the past, the Court, when assessing whether certain domestic remedies were effective, has examined the positions of the parties involved in great detail, also taking into account the reports and reactions of domestic institutions as well as international institutions. (*Salah Sheekh v. the Netherlands*, among many others). In both the *Mercan* and *Zihni* cases, however, the Court has failed to assess the actual – rather than theoretical – availability or accessibility of domestic remedies. Instead, without any further inquiry or accompanying analysis the Court simply accepted the accessibility to, and effectiveness of, domestic remedies in Turkey as fact. In light of recent events, it seems that the Court – by requiring these applicants to seek domestic remedies – is elevating form over substance, in effect depriving them of any realistic opportunity to seek meaningful justice.

In doing so, the Court has ignored the opinions and memoranda of the organs of the Council of Europe, and NGO reports. Thus, in a recent memorandum, the Council of Europe Commissioner for Human Rights noted that he was informed personally by the Turkish Minister of Justice that persons whose names are annexed to decrees are considered to be dismissed by a law, and therefore do not have a judicial remedy. The Commissioner also concludes that it would be a ‘significant challenge’ for Turkey to prove that:

“even in a context where close to 3,500 members of the judiciary have been dismissed and thousands imprisoned, Turkish courts can still provide effective remedies for potential human rights violations caused by arbitrary measures taken by the executive or the administration, or even by the judiciary itself.”

Later on, in its recent opinion of 12 December, the Council of Europe’s Venice Commission regrets that the dismissals (in the appended lists) “*apparently*” are not subject to judicial review by Turkish ordinary courts. It is also meaningful that the Venice Commission discusses (paras.195-216) that even “the accessibility of the judicial review remains a matter of controversy”, let alone the effectiveness thereof.

As to effective access to a domestic remedy in the form of an administrative action, the Court notes that (para.24):

“In its judgment of 4 November 2016, the Supreme Administrative Court had examined an application for judicial review lodged by a judge who had been dismissed following a decision issued by the Supreme Council of Judges and Public Prosecutors under emergency legislative decree no. 667. Although the Supreme Administrative Court had found that it did not have jurisdiction to examine the merits of that application, it had remitted the case to the first-instance court, holding that it was primarily for the administrative courts to examine such applications.”

As regards to the question of whether administrative courts can be regarded as an effective remedy and afforded a reasonable prospect of success, the decision of Trabzon Administrative Court on 30 September might be in point. The Trabzon Court rejected a case concerning the dismissal of a schoolteacher in the state of emergency context in which it found that the decrees (*Kanun Hükmünde Kararnameler*, *KHK*) are the functional

equivalent of legislative actions (not administrative actions) and therefore, cannot be subjected to judicial review by administrative courts. Thus, while administrative courts are theoretically seemingly capable of providing an appropriate remedy, in practice, there is little if any chance of success.

With regard to the individual application mechanism of the TCC, the Court still views it as being effective and impartial. In both the *Zihni* and *Mercan* cases, the Court clearly stated that the arguments submitted by the applicants were insufficient to cast doubt on the effectiveness of the TCC, noting that the fears of the applicants as to the impartiality of the TCC's judges (based on the dismissal decision) does not, *prima facie*, relieve an applicant of the obligation to lodge an application before that court.

The Court, however, has failed to elaborate this assertion. Rather it sufficed citing a number of judgements of the TCC, which predate the state of emergency decrees and the subsequent “hands off” decision of the TCC, in support of its position (e.g. a judgment of the TCC rendered on 25 February 2016 concerning journalists Erdem Gül and Can Dündar).

Is that a reasonable assessment by the Court? It is true that, starting in late 2014, the TCC has ruled in support of the fundamental rights and freedoms; but those decisions are unreliable predictors of how or whether the TCC would perform similarly meaningful legal review in assessing alleged rights violations in the context of state of emergency decrees. Nor does it ensure impartiality in the face of the Turkish government's crisis mentality that has led to far-reaching measures that disregard fundamental human rights.

Moreover, in its decision of 9 August, the TCC dismissed two of its members based solely on “*the information from the social circle*” and “*the common conviction formed by the members of the TCC*”. The relevant question for the Court then becomes: How can the TCC provide an effective remedy for massive dismissals when the same court dismissed its own members based entirely on ‘information’ and ‘conviction’ without verifiable evidence? Does this reasoning not cast substantial doubt on the impartiality and thus, the effectiveness of the TCC? These questions should have been clearly answered by the Court.

Also relevant is that on 12 October, the TCC rejected the appeals (here and here both in Turkish) seeking annulment of a number of provisions of the emergency decrees. The TCC ruled that it has no jurisdiction to review the constitutionality of emergency decrees (*in abstracto*) under Article 148 of the Turkish Constitution. This decision is acknowledged by the Court in *Zihni* case, where it states that (para.12):

“...the fact that the [Turkish] Constitutional Court had ruled on the constitutionality of a law, in the context of a challenge to constitutionality, did not prevent members of the public from lodging an individual appeal before that court against specific decisions taken in application of the provisions of that particular [decree] law.”

As the Court correctly points out, according to Article 148 § 3 of the Turkish Constitution, the TCC is competent to examine the implementation of emergency decrees through the individual application mechanism after exhaustion of the ordinary remedies. Now that the Supreme Administrative Court of Turkey has held that the first-instance administrative

courts will examine the dismissals, the TCC will most likely reject, for non-exhaustion of ordinary legal remedies, the more than 60,000 currently pending cases arising from the emergency decrees since 15 July. If, as expected, the TCC refers those cases to the administrative courts, individual application mechanism to the TCC may well prove to be wholly ineffective. It will result in extraordinary delays that, judging from the Trabzon Court's decision, will ultimately be of no avail, theoretically then permitting individual application to the TCC. In such a scenario, even under the most favourable circumstances, the TCC would be unable to provide appropriate remedies in a timely fashion.

In conclusion, the Court's reasoning in *Zihni* and *Mercan* raises serious questions. Did the risk of a significant increase in the Court's docket (with more than 3,000 cases are currently pending) influence the Court to adopt such a narrow approach? Without question, there is potential for a flood of applications to the Court from Turkey. Or did the larger context of a state of emergency influence the Court's decision? Examination of case law deriving from the Convention reveals that the Court has steadily afforded a wide margin of appreciation to the presence of an emergency and to the nature and scope of the derogations necessary to avert it. It is possible that the Court would have interpreted the procedural constraints on access to justice differently if the application were not related to the measures taken in a state of emergency context.

Nonetheless, and leaving aside the legitimacy of the state of emergency measures in Turkey generally, the dismissals of *Zihni* and *Mercan* based on a failure to exhaust domestic remedies may be subject to criticism due to the uncritical assumptions implicit as to accessibility and availability of such remedies. It is an open question as to whether such domestic remedies are truly "effective and available" in today's Turkey, a question that the Court has failed to answer.